Supreme Court, U.S.
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No. 92-582

In The

Supreme Court of the United States

October Term, 1992

JODIE DENISE PAUL,

Petitioner,

v.

EUGENE MOORE AND EDITH MOORE,

Respondents.

Petition For Writ Of Certiorari To The Georgia Supreme Court

BRIEF FOR RESPONDENTS EUGENE MOORE AND EDITH MOORE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

PARTIES

Jodie Denise Pope (now Paul)
Walter Keith Pope
Eugene Moore
Edith Moore
Georgia Department of Human Resources (and Agencies thereof)
James G. Ledbetter
Shirley A. Tate
Patricia L. Johnson
Douglas G. Greenwell
Carol R. Dingler
William M. Denton
Janice L. Maddox
Henrietta Lovett

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COUNTER-STATEMENT OF THE CASE

To briefly summarize the facts that led to the filing of this action in state court in Georgia, two male children were born on October 7, 1983, at the Griffin-Spalding County Hospital in Griffin, Georgia. They were switched before leaving the hospital, and Jodie Denise Paul, formerly known as Jodie Denise Pope, the petitioner herein, took home a child that was to have been put up for adoption through the Georgia Department of Human Resources. Said child is now known as Cameron Keith Pope. The petitioner's natural child, now known as Melvin Eugene Moore, was given up to the Georgia Department of Human Resources, and placed with Eugene and Edith Moore, respondents herein, and said child was later adopted by the respondents in Liberty County, Georgia Superior Court. The respondents have exclusively raised and had sole custody of Melvin Eugene Moore, the petitioner's natural child, since shortly after his birth until late November 1991. Likewise, the petitioner has raised Cameron Keith Pope since his birth. Both children are now nine (9) years of age.

After discovery of the switch by blood tests during divorce proceedings of the Popes in 1988, the petitioner sought to adopt the child she raised from birth, and also sought to obtain custody of her natural child, Melvin Eugene Moore, whom she had never met. Her adoption petition was granted in Spalding County Superior Court, and the judgment was appealed by the respondents. In *Moore v. Pope*, 196 Ga. App. 475 (1990), the Georgia Court of Appeals reversed the trial court's holding saying that Ms. Paul did not have standing to bring the adoption petition since she was neither a step-parent nor relative

of the child. The Georgia Supreme Court granted certiorari, and in *Pope v. Moore*, 261 Ga. 253 (1991), ruled that the Moores had no standing to object to the adoption as they were not blood relatives of the child. Therefore, Ms. Paul, the petitioner herein, has succeeded in adopting one of the switched children, who was supposed to have been adopted by the Moores through the Georgia Department of Human Resources, and she is seeking certiorari to review a state court order dated October 2, 1991, awarding joint custody of her natural child to Ms. Paul, her ex-husband, and the Moores. The order of Judge Frank M. Eldridge is a lengthy discussion of the competing interests and rights of the parties, as well as the law involved, and resembles something Solomon would have done in this difficult and unique situation. (This order appears in the petitioner's petition at pages 16a through 32a and again herein at Appendix A).

If successful in reversing the trial court, Jodie Paul would retain both of the children which were swapped at birth, stripping the Moores of a nine (9) year old child they have raised from infancy and leaving the Moores with no child.

APPELLATE COURT ACTION

On November 1, 1991, Ms. Paul simultaneously filed an application for discretionary appeal and notice of appeal in the Supreme Court of Georgia of the trial court's custody order of October 2, 1991. In Ms. Paul's application for discretionary appeal, she failed to raise as an enumeration of error denial of due process based on

the trial court's alleged failure to conduct an evidentiary hearing on the best interests of the child. The Georgia Supreme Court denied her application for discretionary appeal on November 25, 1991. Ms. Paul further failed to file a motion for rehearing upon denial of her application for discretionary appeal. She has continued to pursue her direct appeal through the Supreme Court of Georgia.

The Moores countered by filing a motion to dismiss Ms. Paul's notice of appeal on the grounds that a direct appeal was not appropriate since Ms. Paul's application for discretionary appeal had been denied. The case was then transferred to the Georgia Court of Appeals, and the Moores again filed a motion to dismiss on the same grounds. Said motion was granted on March 10, 1992. Ms. Paul's motion for rehearing was denied on March 25, 1992. On April 3, 1992, Ms. Paul filed a petition for writ of certiorari with the Georgia Supreme Court, which was denied on July 2, 1992.

After the trial court's order of October 2, 1991, the Moores permitted Jodie Pope (now Paul) to take the child to Georgia for a visit during the Thanksgiving holiday. The Moores have never seen their son since because the petitioner refused to return the child in violation of the trial court's order.

In the Petition for Writ of Certiorari, the Court may notice (page 3 and footnotes 28 and 29) allegations by the petitioner that Edith Moore had abused Melvin by cursing at him and hitting him. These allegations stem from affidavits of neighbors solicited by the petitioner at the time she refused to return the child.

The respondents deny that the child has been abused and can show that these Fort Knox, Kentucky neighbors' claims were inquired into by authorities and were found to be unsubstantiated. These claims were totally unknown at the time of the Court's order of October 2, 1991, and none of the petitioner's affiants have testified in any proceeding in this matter.

The Uniform Child Custody Jurisdiction Act would provide the petitioner opportunity to seek modification of custody if she had evidence of abuse. (Kentucky Revised Statutes, Section 403.400 et seq.)

The facts of this case show that the petitioner in no way had her parental rights terminated, but rather was awarded joint custody of Melvin Eugene Moore. The trial court's order states,

> "In balancing the respective rights of the Popes and Moores, they must stand equal and are entitled to joint custody rights of the boy. This means that all are entitled to school, medical, religious and extra-curricular reports on the boy and have a voice in deciding issues concerning the health, safety, welfare, morals, religion and education of the boy . . . " (Petition, p. 28a, Appendix A hereto, p. 14).

ARGUMENT

This is not a case in which it is appropriate to grant the petition for a writ of certiorari in accordance with the Rules of the Supreme Court of the United States. Respondents respectfully request that the petition be denied for the following reasons:

1. THE "QUESTIONS PRESENTED" IN THE PETITION ARE NOT ACCURATE PRESENTATIONS OF THE LEGAL RULINGS IN THE CASE.

At Rule 14.5, the Rules of the Supreme Court of the United States state,

> "The failure of a petitioner to present *with accuracy*, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition."

The petition presents three muddled questions which are all interrelated. The questions all presume a totally inaccurate, false proposition that the petitioner herein has had her parental rights terminated. The case was a custody decision in which the court balanced the interests of all the parties. Jodie Pope (Paul) no more had her parental rights terminated than did Walter Pope, Melvin's natural father, who favored custody remaining in the Moores. The order (Petition, pp. 16a - 32a and Appendix A hereto) speaks for itself.

These inaccurate statements by the petitioner should be "sufficient reason for denying the petition."

2. THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING THIS PETITION.

Rule 10 of the Supreme Court Rules provides that "review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Petitioner seeks review of a state

court order awarding joint custody of a child mistakenly switched at birth and raised by non-biological parents. The factual situation of the case at bar is bizarre and unlikely to happen again. Available to the petitioner is the remedy of filing a change of custody proceeding in Kentucky, the home state of the child, under the Uniform Child Custody Jurisdiction Act which has been adopted by the states of Kentucky and Georgia. There are no special and important reasons to grant certiorari.

Rule 10.1 (a), (b), and (c) of the United States Supreme Court Rules indicate the character of reasons this court will consider in reviewing a petition for writ of certiorari. Rule 10.1 (a) involves a United States court of appeals decision and can be excluded. It is difficult to determine if the petitioner is seeking a review under (b) "when a state court has determined a federal question in a way that conflicts with the decision of another state court or of a United States court of appeals," or (c) "when a state court has decided an important question of federal law which has not been, but should be, settled by the Supreme Court or has decided a federal question in a way that conflicts with applicable decisions of the Supreme Court." The case at bar fits neither. Had the petitioner attacked the constitutionality of the Georgia discretionary appeal law, there might be constitutional issues for this court to entertain. Petitioner seeks review on general Fourteenth Amendment due process grounds.

3. PETITIONER IN HER STATEMENT OF THE CASE DOES NOT SPECIFY THE STAGE IN THE PROCEEDINGS AT WHICH THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED.

At Rule 14.1 (h) the Rules of the Supreme Court of the United States provide,

> "If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised . . . "

The provisions of Rule 14.1 (h) were not complied with in the petitioner's statement of the case. The petition seems to present two issues: (1) that her parental rights were terminated without surrender or termination hearing, thus denying her due process, and (2) the trial court's failure to conduct an evidentiary hearing on the best interests of the child, thus denying her due process.

As to the first issue, the petitioner's entire argument is based upon a mis-statement of fact, i.e., that her parental rights were terminated. As to the second issue regarding the failure of the trial court to conduct an evidentiary hearing on the best interests of the child, fitness of the competing parties was never an issue in the trial court. The petitioner's crossclaim for physical custody filed on May 21, 1991, in the state court makes no allegation that the respondents are unfit. The petitioner failed to raise this issue as an enumeration of error in her application for discretionary appeal, the first and by far most critical stage of the appellate process. (Attached

hereto at Appendix B is that brief). The petitioner never sought rehearing on her application for discretionary appeal, so this argument should be deemed abandoned since it was not timely raised.

4. PETITIONER HAS A REMEDY AND COMES BEFORE THE COURT WITH UNCLEAN HANDS.

After the trial court's order of October 2, 1991, the Moores allowed Melvin Eugene Moore to leave his Kentucky home to visit the petitioner, Jodie Paul, in Georgia over the Thanksgiving holidays for the first time. Ms. Paul refused to return the child at the expiration of the visitation period as had been agreed, and has continued to hold said child in violation of the trial court's order. She elected to take the law into her own hands rather than follow proper procedure seeking custody through the courts.

The petitioner argues that the Georgia Supreme Court has foreclosed her last opportunity to have any post-termination review of the merits. There was no termination. The petitioner has a clear remedy under the terms of the Uniform Child Custody Jurisdiction Act (Kentucky Revised Statutes, Section 403.400, et seq.) in the form of a motion for modification of custody in the courts of the child's "home state."

CONCLUSION

For the foregoing reasons, the respondents respectfully pray that the Petition for a Writ of Certiorari to review the decision of the Georgia Supreme Court be denied.

Respectfully submitted,

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APPENDIX A

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JODIE DENISE POPE, Plaintiff vs. GEORGIA STATE DEPT. OF HUMAN RESOURCES, GEORGIA STATE DIV. OF FAMILY AND CHILDREN SERVICES, SPALDING COUNTY DEPT. OF FAMILY AND CHILDREN SERVICES, WARE COUNTY DEPT. FAMILY AND CHILDREN SERVICES, JAMES G. LEDBETTER, SHIRLEY A. TATE, PATRICIS L. JOHNSON, DOUGLAS G. GREENWELL, CAROL F. DINGLER, WILLIAM M. DENTON, JANICE L. MADDOX, and HENRIETTA LOVETT, Defendants	CIVIL ACTION FILE NO. D-80775
WALTER KEITH POPE, Plaintiff vs. GEORGIA STATE DEPT. OF HUMAN RESOURCES, GEORGIA STATE DIV. OF FAMILY AND CHILDREN SERVICES, SPALDING COUNTY DEPT. OF FAMILY AND CHILDREN SERVICES, WARE COUNTY DEPT. FAMILY AND CHILDREN SERVICES, JAMES G. LEDBETTER, SHIRLEY A. TATE, PATRICIA L. JOHNSON, DOUGLAS	CIVIL ACTION FILE NO. D-80852

G. GREENWELL, CAROL R. DINGLER, WILLIAM M. DENTON, JANICE L. MADDOX, and HENRIETTA LOVETT, Defendants	)	
EUGENE MOORE and EDITH MOORE, Plaintiffs vs. GRIFFIN SPALDING COUNTY HOSPITAL AUTHORITY d/b/a GRIFFIN SPALDING HOSPITAL, VICKIE VAUGHN, LOIS SHIRAH, GEORGIA STATE DEPT. OF HUMAN RESOURCES, GEORGIA STATE DIV. FAMILY AND CHILDREN SERVICES, SPALDING COUNTY DEPT. FAMILY AND CHILDREN SERVICES, WARE COUNTY DEPT. FAMILY AND CHILDREN SERVICES, JANICE L. MADDOX and HENRIETTA LOVETT, Plaintiffs vs. JODIE DENISE POPE and WALTER KEITH POPE, Third Party Defendants	)	CIVIL ACTION FILE NO. D-85627

ORDER

I

JURISDICTION

This Court has personal jurisdiction over all the parties which includes the Popes and the Moores. The Moores have submitted themselves to the jurisdiction of this Court by making a general appearance to assert their claims and the Popes have been joined individually by third-party action and have brought counter-suit for custody against the Moores.

The Uniform Interstate Custody Act, O.C.G.A. 19-9-40 et seq., does not apply because the validity of the judgment of adoption is being attacked collaterally, and the present custody order of the Moores' depends upon the presumptive validity of the adoption.

Mrs. Pope can collaterally attack the judgment of adoption rather than seek to set aside the judgment under O.C.G.A. 9-11-60(b) because she is the natural parent of the minor child; her parental rights have never been statutorily or constitutionally terminated, and the judgment, neither under the doctrines of res judicata, collateral estoppel or estoppel by judgment, bind her since she was neither a party nor privy and had no notice of such action.

No action is now pending before a Georgia trial court seeking to determine the custody of the minor child.

Mrs. Pope commenced her action to regain her son as soon as she discovered or reasonably could have discovered that her son had been switched at birth. Neither the equitable doctrine of laches nor any statute of limitations

bars this action to regain custody of the Pope child by birth.

II

RATIONALE

Freedom constitutes the bedrock of this Republic. The fundamental duty of government mut be the protection of its citizens in their " . . . life, liberty and pursuit of happiness."[1] "Protection to person and property is the paramount duty of government and shall be impartial and complete."[2] Human rights or personal liberties evolved at common law from property rights.[3] At common law, property rights had the greatest legal protection as a personal right; human rights developed only in a system of legal rights that safeguarded a person's rights to property.

Locke, Voltaire and Rousseau influenced Thomas Jefferson, Benjamin Franklin, Samuel Adams and the other framers of both the Declaration of Independence and The Constitution of the United States. Certain fundamental and inalienable rights have been given to all citizens as human rights. These human rights evolved in the conceptualization of the 17th and 18th century political thinkers from property rights and found clear expression

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[1] *Declaration of Independence;* see also Preamble, Constitution of the United States of America.

[2] Art. I, Sec. I. Par. II, 1983 Constitution of Georgia; Art. I, Sec. II, Par. III of the 1976 Constitution of Georgia.

[3] Homes, *The Common Law;* Lerner, *The Mind and Faith of Justice Holmes,* Random House, Inc., (N.Y., 1948).

in the Declaration of Independence and in the Bill of Rights. Whether such rights derive from natural law or from a social compact of the governed, such rights became guaranteed in the Constitution.

The Jeffersonian concept of human rights has clear expression through "The powers not delegated to the United States by the Constitution, not prohibited by it to the States, are reserved to the States respectively *or to the people.*"[4] The Bill of Rights protects the people from unauthorized and unreasonable intrusion into their lives by any government. The right of privacy from government invasion comes within such reserved right by necessity and exists as a pneumbra right derived from the First, Third, Fourth, Fifth and Ninth Amendments.[5]

Constitutional privacy rights have been found to exist by implicit expression in the Georgia Constitution as well.[6] The protection of citizens by the State " . . . in the full enjoyment of the rights, privileges, and immunities due to such citizenship," has such broad ambit as to encompass the privilege of privacy from unwarranted

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[4] Tenth Amendment, The Constitution of the United States

[5] *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973); see also dissent by Justice Douglas in *Poe v. Ullman*, 367 U.S. 497, 509-521 (1961); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942).

[6] *Jefferson v. Griffin & c. Hosp. Auth.*, 247 Ga. 86, 274 S.E.2d 457 (1981); *Zant v. Prevatte*, 248 Ga. 832, 266 S.E.2d 715 (1982); *In re: L.H.R.*, 253 Ga. 439, 446, 321 S.E.2d 716 (1984); *State of Ga. v. McAfee*, 259 Ga. 579, 385 S.E.2d 651 (1989); *Kirby v. Spivey*, 167 Ga. App. 751, 753(2), 307 S.E.2d 538 (1983).

state intrusion.[7] Parents have a legally protected interest in the birth of progeny.[8]

The family constitutes the basic unit of society. Preservation of the family is necessary to protect society. At common law, the familial relationship had protection as a property right because such analysis afforded the highest protection under such analysis; when human rights developed and received higher protection when balanced against property rights, familial relations required a human rights analysis. Family relationships represent a complex bundle of human rights which, unlike property rights, intertwine, grow together and branch off without neat separability. Absent the family, society cannot properly socialize, educate, inculcate, motivate and nurture the infant to become a mature, moral, productive individual. Totalitarian societies from Sparta, the Third Reich, and the Soviet Union have tried and failed to replace the family with the State.

Basic to the family must be the minor child. Until the minor child approaches majority, the child has no individual civil and constitutional rights that can be asserted either against the parent, someone in loco parentis or society. The parents, by the pneumbra of their constitutional and civil rights, protect the minor child from

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[7] Art. I, Sec. I, Par. VII, The 1983 Constitution of Georgia; see also Art. I, Sec. II, Par IX, The 1976 Constitution of Georgia

[8] *Atlanta Ob. & Gyn. Group v. Abelson*, 195 Ga. App. 274, 392 S.E.2d 916 (1990), see also *Fulton-DeKalb Hosp. Auth. v. Graves*, 252 Ga. 441, 314 S.E.2d 653 (1984); *Azzolino v. Dingfolder*, 337 S.E.2d 528 (NC, 1985); *Wilson v. Kuenzi*, 751 S.W.2d 741 (MO, 1988); *Smith v. Cote*, 513 A.2d 341, 347 (N.H., 1986)

others. The parents exercise religion and speech extent to the minor. If the minor seeks to exercise independent freedom of speech or from search and seizure against a *parens patriae,* i.e., a school, when the parents have no involvement, then such right has no protection as a constitutional right.[9] The parent has a natural or fundamental right in the relationship with the child, " . . . bone of my bone, flesh of my flesh."[10]

> If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[11]

It logically follows that if individuals have a constitutionally protected privacy interest in whether or not to have a child, such same constitutionally protected privacy interest protects the relationship between the parent and child, once born, as a human right superior to any common law rights or interests.

Progeny provide parents with posterity so that the person can preserve their identity, tradition, and existence. The child may be a vital aspect of the parent's religion. Parenting permits a person to mature, sacrifice, love, share and grow. Parenting holds endless opportunities in the relationship for both the parent and child.

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[9] *Hazelwood School Dist., et al v. Kuhlmeir,* 484 U.S. 260, 108 S.C. 562 (1988); *New Jersey v. T.L.O.,* 469 U.S. 325, 105 S.C. 733, 83 L.Ed.2d 720 (1985)

[10] *Supra* at note 8

[11] *Eisenstadt v. Baird, supra* at p. 453

The right to choose to assume such part in creation is a fundamental civil right.[12]

Barren couples, same sex couples and single adults, seek the opportunity to parent through adoption. Fees and expenses of twenty thousand dollars to adopt in Georgia from private agencies have become common. Private agencies search Asia, Eastern Europe and South and Central America for children to fill the demand for adoptable children. Even AIDS, retarded and handicapped children fill the needs to parent of single adults.

The State of Georgia has chosen to take State action to regulate, to approve and to supervise adoptions. The State licenses private agencies to place children. The State, through the Family and Children Services of the Department of Human Resources, screens and approves most adoptions and, as in this case, actually places the child for adoption. The Court, for the State, carries out the final adoption by terminating parental rights and granting an adoption decree changing the legal relationship of the parties and the child.

The State has a compelling interest in the adoption of orphans and unwanted, neglected or abused minors. The State has a vital interest in the health, welfare, morals, safety and education of all minors and the status of a minor. Making them eligible for adoption also places them at risk regarding proper health, welfare, education, morals and safety. Unless such minors receive proper care and nurture, they may fail to grow into mature productive citizens and instead become liabilities to society as

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[12] *Supra*, note 5

antisocial, addictive, dependent, mentally ill or non-productive. Through adoption, the minor may achieve a stable home environment where he can receive the love, nurture and care that will make it more probable that the child will become a normal mature adult, both physically and psychologically. If the State fails to place unwanted minors for adoption, it has the burden, both financially and developmentally, of raising the minor; to carry out such responsibility means either institutionalization or foster care. Both methods of rearing children have risks for the child of a traumatic nature, both physically and psychologically. A disproportionate number of psychopaths, sociopaths, and abusers, both physically and sexually, come from individuals who were raised, in whole or in part, either in institutions or foster care. Another consideration of a lesser State interest lies in affording the opportunity to parent, by adoption, to those the State, by reasonable criteria, finds are qualified to rear, nurture and care for a minor.

Adoption laws have been passed and amended that make it easier and easier to adopt in less time. The early adoption statute in Georgia required six months and two court hearings before the adoption became final.[13] The notice and hearing to place temporary custody occurred no less than 75 days after the petition had been filed.[14] Such liberalization of the adoption standards caused "without justifiable cause"[15] to be eliminated from the termination of a parent's rights in a step-parent adoption

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[13] Ga. Laws 1941, pp. 300, 305, Sec. 11

[14] Id, p. 302, Sec. 5

[15] Ga.L. 1972, pp. 201, 211, Sec. 1, Sec. 74-405(a)(1)(2)

on the grounds of failure "to communicate" or "to provide for the care and support" for one year or more;[16] this code section was declared unconstitutional as violating due process of law by denying the parent the opportunity to show the reason for such failure.[17] Those who lobbied for passage or amendment of adoption laws have ignored and not adequately safeguarded the rights of natural or putative parents in the termination of parental rights. Fraud and duress in obtaining parental consent, mistake in the identity of the child to be adopted, and inadequacy of notice to a parent or putative parent have not been dealt with adequately by the adoption statutes. The Courts have had to fashion remedies and procedures to fill statutory gaps in adoption.[18]

Since constitutional rights of both parents or the birth mother and putative biological father are involved, notice and an opportunity to be heard prior to termination of the parental right is essential as a matter of procedural and substantive due process under both the Fifth and

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[16] Ga.L. 1979, p. 1182, Sec. 5

[17] *Thorne v. Padgett,* 259 Ga. 650, 386 S.E.2d 155 (1989)

[18] *In re Baby Girl Eason,* 257 Ga. 212, 358 S.E.2d 459 (1987); *Duncan v. Harden,* 234 Ga. 204, 214 S.E.2d 890 (1975); *Wellfort v. Bowick,* 147 Ga. App. 565, 249 S.E.2d 363 (1978); *Downs v. Wortman,* 228 Ga. 315, 184 S.E.2d 387 (1971); *Smith v. Finstad,* 247 Ga. 603, 277 S.E.2d 736 (1981); *Chandler v. Cochran,* 247 Ga. 603, 277 S.E.2d 736 (1981); *Chandler v. Cochran,* 247 Ga. 184, 275 S.E.2d 23 (1981); *In re White,* 254 Ga. 678, 333 S.E.2d 588 (1985); *Thorne v. Padgett,* 259 Ga. 650, *supra; McDonald v. Hester,* 115 Ga. App. 740, 155 S.E.2d 720 (1967); *Drummond v. Fulton County Dept. of Family and Children Serv.,* 547 F.2d 835 (5th Cir.) on rehearing 563 F.2d 1200 (5th Cir., 1977) cert. denied 437 U.S. 910, 98 S.Ct. 3103, 57 L.Ed.2d 1141 (1978).

Fourteenth Amendments of the Constitution of the United States[19] and Article I, Section I, Par. I, of the 1983 Constitution of Georgia,[20] Procedures for surrender of or termination of parental rights require strict construction against the adoption and in favor of the parent.[21] Before an adoption can become legal, the consent of the parents or the abandonment and termination of their parental rights must occur.[22] Adoption did not exist at common law, thus it is a creature of statute.[23]

In this case, all legal steps necessary to effectuate a *de jure* adoption have been met, including the proper termination of the parental rights of the baby boy to be adopted by the Moores. However, the subject of the adoption was switched with the Pope's baby boy so that the Moores received the Pope baby, and the Popes received the baby boy to be adopted by the Moores. The legal

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[19] *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Quillian v. Walcott*, 434 U.S. 246, 546 L.Ed.2d 511, 98 S.Ct. 549 (1978); *Caban v. Mohammed*, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979); *Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983); *Michael H. & Victoria D. v. Gerald D.*, ___ U.S. ___, 109 S.Ct. 2333 (1989)

[20] *In re Baby Girl Eason*, 276 Ga. 292, *supra*

[21] *Johnson v. Smith*, 251 Ga. 1, 302 S.E.2d 542 (1983); *Thorne v. Padgett*, 259 Ga. 650, *supra* at 17; *Nelson v. Taylor*, 244 Ga. 657, 261 S.E.2d 579 (1979)

[22] *Roberts v. Muscogee County Dept. Family and Children Serv.*, 150 Ga. App. 750, 258 S.E.2d 689 (1979); *Owens v. Griggs*, 151 Ga. App. 730, 261 S.E.2d 463 (1979); *Spires v. Bittick*, 171 Ga. App. 914, 321 S.E.2d 407 (1984); *Ritchie v. Dillon*, 103 Ga. App. 7, 118 S.E.2d 115 (1961); *Wojciechowski v. Allen*, 238 Ga. 566, 234 S.E.2d 325 (1977); *Ellis v. Woods*, 214 Ga. 105, 103 S.E.2d 297 (1958).

[23] *Johnson v. Eidson*, 235 Ga. 820, 221 S.E.2d 813 (1976)

adoption steps and court action were completed so that the Moores believed that they had a *de jure* adoption of the proper child. The Court went through the three-step decision-making to determine: first, if the parents consented; second, are the adopting parents worthy and able to care for the child; and third, is the adoption in the best interest of the child.[24] All parties and the Court operated on a mistake of law and fact as to the identity of the adopted child. Thus, the adoption is a *de facto* adoption, good against the entire world except the natural or biological parents, the Popes, whose rights had not even been attempted to be terminate; and no grounds for termination existed then or now. The Popes, as the natural parents, possess and retain all the rights, duties and responsibilities of paternity. Mrs. Pope is the biological, natural and lawful mother of this child.

For over eight years the Moores have loved, nurtured and reared the boy as their own son. Until the Popes discovered they had a boy who was not their biological son, the Moores, in law and in fact, exercised legal paternity which is equivalent in law to the birth of the child.[25] They have given freely of their time, emotions and material possessions to support this boy as their son. To the boy and to the Moores there exists a bonding and familial relationship that no court ruling can undo. This child's identity and self concept has developed from the familial

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[24] *Allen v. Morgan*, 75 Ga. App. 738, 44 S.E.2d 500 (1947); *Herrin v. Graham*, 87 Ga. App. 291, 73 S.E.2d 572 (1952)

[25] *Mulligan v. Mulligan*, 201 Ga. 444, 39 S.E.2d 699 (1946); *Thornton v. Anderson*, 207 Ga. 714, 64 S.E.2d 186 (1951); *Warner v. First Nat'l Bank*, 242 Ga. 661, 251 S.E.2d 511 (1978)

relationship with the Moores. The Moores have fought to protect and to shield their son, and he has sought refuge within the pneumbra of their civil rights and their right to privacy. In the creation of this relationship, the Moores must be held blameless. They have developed human rights and property interests in the adopted boy under color of law through a *de facto* adoption. They were granted parental rights by the State of Georgia and have acted *in loco parentis* for the entire life of the boy. The boy's privacy rights and expectations have been shrouded by the Moores' rights rather than the Popes' who have never had physical custody after the boy left the hospital.

While the Popes remain the biological, natural and legal parents of this boy, the Moores, as *loco parentis* through *de facto* adoption, over eight years have developed vested constitutional privacy rights in the relationship as well that must be balanced. This situation is analogous to a divorce in which each parent has equal rights to custody, and the Court must decide the case on the basis of the best interest of the child. Where there exist conflicts in constitutional rights the Court must engage in a balancing of rights and interests.

In matters of adoption, the Court has very broad discretion.[26] The paramount concern of the Court must be

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[26] *McCall v. Van Popering*, 124 Ga. App. 149, 183 S.E.2d 411 (1971); *Nix v. Sanders*, 136 Ga. App. 159, 223 S.E.2d 21 (1975); *Ritchie v. Dillon*, 103 Ga. App. 7, *supra; Owens v. Griggs*, 151 Ga. App. 730, *supra; Johnson v. Taylor*, 153 Ga. App. 15, 264 S.E.2d 512 (1980); *Chandler v. Cochran*, 247 Ga. 184, *supra; Cox v. Bohannon*, 86 Ga. App. 236, 71 S.E.2d 440 (1952)

the welfare and best interests of the child.[27] In balancing the respective rights of the Popes and Moores, they must stand equal and are entitled to joint custody rights of the boy. This means that all are entitled to school, medical, religious and extracurricular reports on the boy and have a voice in deciding issues concerning the health, safety, welfare, morals, religion and education of the boy. To determine visitation and custody the Court must resort to the best interest of the child test.

The Popes have been divorced in a contested action which raised the issue of the paternity of the child that they raised. From the litigation and the divorce, it can reasonably be inferred that there still exists some tension between them. Mrs. Pope, to her credit, fought and finally won the right to adopt the only son that she has known and has reared over the last eight years. She works as a waitress to support herself and her adopted son. She lives in Griffin, Spalding County, Georgia, a small city lying in the Piedmont region of central Georgia which has a mixed agricultural, mill, manufacturing, retail and service economy.

The Moores are a mixed race couple that Family and Children Services have found suitable people for adoption of a boy. They have fought long and hard to protect their adopted son on the income of a career non-commissioned officer. The significance of the mixed marriage is that they sought to adopt a child of mixed parentage and have reared the child with the identity of mixed heritage.

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[27] *Herrin v. Graham*, 87 Ga. App. 291, *supra; Allen v. Morgan*, 75 Ga. App. 738, *supra; Hester v. Mathis*, 147 Ga. App. 257, 248 S.E.2d 23 (1981)

At eight years of age, this boy has the self image and self concept of a racially mixed child in a racially mixed family. The military posts, both in the United States and abroad, have a concentration of more racially mixed families, both civilian and military, than does Griffin, Georgia; there exists greater racial tolerance and acceptance in the military than in the country as a whole. The Moores have provided a loving, nurturing and stable environment for the last eight years. The military with its direct or sudsidized education provides a better educational, cultural, and developmental environment than does Griffin, Georgia. The health system provided for military dependents equals or is superior to most private health insurance plans. Mr. Moore has provided a positive male role model, but Mrs. Pope has to act as a single parent taking on the roles of both mother and father. Being a single parent is difficult but having two males in this age range, who do not know each other, would be taxing with risks of sibling rivalry and favoritism. To adjust and cope with being uprooted from one family and dropped into another in a different environment would be traumatic and cause unreasonable anxiety, lack of structure, and identity problems for the child.

The Court finds that it is in the best interest of the child to remain in the physical custody of the Moores with reasonable visitation with the Popes. As custodial parents, the Moores must consult with Mrs. Pope regarding education, health, safety, welfare, morals and development, but in the event of a conflict the Moores shall make all final decisions.

The divorce between Mr. and Mrs. Pope gave custody of the child to Mrs. Pope with visitation to Mr. Pope. The

child shall visit with the Popes from June 15th until August 15th of each summer. If the Moores are living or are stationed in America, the Popes shall have as additional visitation the Spring vacation, Thanksgiving holidays and one portion of the Christmas holidays as observed by the school the child attends. In odd numbered years, Mrs. Pope shall have Christmas Day and the days observed prior to Christmas Day; in even years, Mrs. Pope shall have the day after Christmas through New Year's Day. Mr. Pope may have the first, third, fifth and seventh weekends of the summer period from 6:00 P.M. on Friday until 6:00 P.M. on Sunday.

The natural parents and the adoptive parents individually have the duty to support this minor child. The Court hereby orders that the Moores support the child. The Court hereby orders that the Moores support the child by paying all his necessities, except as hereinafter provided, for the period of their custody; Mrs. Pope has the duty to pay all such necessities during the minor child's visitation with her; Mr. Pope has the duty to pay all such necessities during the minor child's visitation with him. Medical expenses shall include all expenses of health care providers whether for dental care, service or treatment by a medical physician, surgeon, osteopath, psychologist, optometrist or optician; the Moores shall pay one-half of all such expenses not covered by insurance; Mrs. Pope shall pay one-fourth of such expenses and Mr. Pope shall pay one-fourth of such expenses. The Moores shall either pay and seek medical coverage reimbursement of submit the insurance claims within thirty (30) days of the receipt of any bill; the Moores shall, within forty-five (45) days after the submission of an

insurance claim and it remains unpaid or it is paid within such time, submit copies of the bills and the amount to be paid to each of the Popes individually; the Popes shall remit such amount within thirty (30) days to the Moores. If, after payment by the Popes, the Moores receive an insurance reimbursement which covers costs paid by either or both of the Popes, the Moores shall remit such proportionate share of the reimbursement. The Popes each shall be liable for twenty-five percent (25%) of any educational fees, books, or tuition, extra-curricular activities, sports or camp, with the Moores paying the remainder. Mrs. Pope shall be responsible for and pay the transportation costs of the minor child for visitation as child support.

The Court finds that there exists no just reason why this order should not be immediately entered as the final judgment of this Court and orders that the Clerk enter this order as a Final Judgment.

In the event that any party files a notice of appeal, such filing of appeal shall act to stay the effect of this order until it becomes a final judgment as a matter of law.

SO ORDERED this 2 day of October, 1991.

/s/ Frank M. Eldridge
FRANK M. ELDRIDGE,
Judge
Fulton Superior Court
Atlanta Judicial Circuit

APPENDIX B

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JODIE DENISE POPE, Plaintiff/Petitioner vs. GEORGIA STATE DEPT. OF HUMAN RESOURCES, JAMES G. LEDBETTER, L. PATRICIA JOHNSON, CAROL F. DINGLER, JANICE L. MADDOX, HENRIETTA LOVETT, ROSSERLYN ANDERSEN, BARBARA HOLMES and ELAINE GRADDY, Defendants/Respondents	CIVIL ACTION FILE NUMBER: D-80775
WALTER KEITH POPE, Plaintiff, vs. GEORGIA STATE DEPT. OF HUMAN RESOURCES, GEORGIA STATE DIV. OF FAMILY AND CHILDREN SERVICES, SPALDING COUNTY DEPT. OF FAMILY AND CHILDREN SERVICES, WARE COUNTY DEPT. FAMILY AND CHILDREN SERVICES, JAMES G. LEDBETTER, SHIRLEY A. TATE, PATRICIA L. JOHNSON, DOUGLAS G. GREENWELL, CAROL R. DINGLER, WILLIAM M. DENTON, JANICE L. MADDOX, and HENRIETTA LOVETT, Defendants/Respondents	CIVIL ACTION FILE NUMBER: D-80852

EUGENE MOORE AND EDITH MOORE, Plaintiffs/Respondents vs. GRIFFIN SPALDING COUNTY HOSPITAL AUTHORITY d/b/a GRIFFIN SPALDING HOSPITAL, VICKIE VAUGHN, LOIS SHIRAH, GEORGIA STATE DEPT. OF HUMAN RESOURCES, GEORGIA STATE DIV. FAMILY AND CHILDREN SERVICES, SPALDING COUNTY DEPT. FAMILY AND CHILDREN SERVICES, WARE COUNTY DEPT. FAMILY AND CHILDREN SERVICES, JANICE L. MADDOX and HENRIETTA LOVETT, Defendants/Respondents vs. JODIE DENISE POPE and WALTER KEITH POPE, Third-Party Defendant/ Petitioner	CIVIL ACTION FILE NUMBER: D-85627

APPLICATION FOR DISCRETIONARY APPEAL OF FINAL JUDGMENT

NOW COMES Jodie Denise Pope, pursuant to O.C.G.A. 5-6-34(a)(1) and 5-6-35(a)(2), Rule 25 of the Rules of the Georgia Supreme Court, and related law petitions this Court for Leave to Appeal a final judgment entered by Superior Court of Fulton County on October 2, 1991. The petitioner has also simultaneously filed a

Notice of Appeal in the lower court pursuant to O.C.G.A. 5-6-51 and related law.

ENUMERATION OF ERROR

Rulings of the trial court which are enumerated as error and for which leave to appeal is sought are as follows:

(1) The trial court erred by holding that the mistaken placement of the Pope child in an adoption which was attempted for another child will create constitutionally cognizable rights in the third-party couple and divests the parental rights of the natural mother without notice, surrender, or termination.

(2) The trial court erred by holding that a natural mother's constitutionally cognizable parental rights, which have neither been surrendered by her nor terminated at law, may be defeated by a third-party couple who seek to retain physical custody of the natural mother's child.

A discretionary appeal of the final judgment is appropriate where: "(1) reversible error appears to exist, or (2) the establishment of a precedent is desirable." Georgia Supreme Court Rule 25. In this action, both grounds provide ample merit for granting the instant application for appeal.

First, the trial court's grant of physical custody of the Pope child to a third-party couple over the objections of a natural mother, whose parental rights have never been surrendered or terminated, is patent reversible error in the face of all known case law, statutory provisions, and

state and federal constitutional guarantees recognized by the courts of this state.

Second, it would be an alarming and dangerous precedent for a court of this state to allow the natural mother's parental rights to her child to be severed without her voluntary surrender or legal termination and to allow a trial court to do so by simply implementing the best interest of the child analysis whenever custody is challenged by a third-party.

JURISDICTIONAL STATEMENT

The Georgia Supreme Court, rather than the Georgia Court of Appeals, has jurisdiction of this case on appeal for reasons that include the court's equitable jurisdiction as well as the Georgia and United States constitutional issues raised. Ga. Const., Art. VI, 6, Para. II(1) and III(2). It should be noted that this court has once previously accepted jurisdiction over one of the three actions appealed from here, *Jodie Denise Pope vs. DHR, et al.*, as it was transferred on an interlocutory appeal from the Georgia Court of Appeals to the Georgia Supreme Court and then vacated for other reasons.

REASONS FOR GRANTING APPLICATION

A. STATEMENT OF THE CASE

The final order from which the petitioner Jodie Denise Pope makes this application for appeal has been entered in three cases. Each of these cases essentially involves those issues relating to the DHR defendants' failure to recognize that they were attempting to place the wrong

child for adoption following the switch of Jodie Denise Pope's white male child [hereinafter referred to as the "Pope child"] with a mixed race child [hereinafter referred to as the "Williams child"] shortly after birth in October 1983.

In the *initial case* filed against the DHR, Jodie Denise Pope brought a equitable count in order that the DHR be instructed to take all measures necessary to effect the return of the Pope child they had wrongly taken and placed with Eugene and Edith Moore. The *second case* was brought by Jodie Denise Pope's former husband and the Pope child's natural father, Walter Keith Pope, against the DHR defendants seeking only damages in tort. The *final case* against the DHR was filed by Eugene and Edith Moore seeking tort and contract damages. In the Moore's action against the DHR, after the DHR filed its answer and the DHR filed a third party complaint against Jodie Pope, Jodie Pope brought a cross claim against the Moores for physical custody of her natural son.

On October 2, 1991, Judge Frank Eldridge of Fulton County Superior Court entered an Order in all three cases properly noting that the 1984 attempted adoption by the Moores related to the Williams' child and was without notice to Jodie Denise Pope regarding the Pope child, and that Jodie Pope's parental rights as the natural mother had never been surrendered nor terminated. However, the trial court erred by utilizing a simple best interest of the child analysis and holding that the right to physical custody of her natural child had vested the third-party Moores as a result of a *de facto* adoption. It is from that Order from which the petitioner and natural mother Jodie Denise Pope make this application for discretionary

appeal of a final Order. A Notice of Appeal has been filed simultaneously below in Fulton County Superior Court.

B. ISSUES SOUGHT TO BE RAISED ON APPEAL

The issues to be raised on appeal involve the fundamental and inalienable *parental rights* of natural mother, Jodie Denise Pope, as they are challenged by a third-party couple who are unrelated by blood to the petitioner's natural son, who obtained physical custody of the Pope child only through their mistaken attempt to adopt another child, and who admit that the parental rights of the natural mother Ms. Pope have never been surrendered by her nor terminated at law. Because there has been no surrender or termination of the parental rights of Jodie Denise Pope to her natural son, the October 2, 1991 Final Order awarding physical custody of the Pope child to the third-party Moores is not only an absolute aberration of the case and statutory law in this state, but is represents an abject violation of those provisions securing parental rights in the Georgia and United States Constitution. *Lawson vs. Gambell,* 157 Ga. App. 193, 276 S.E.2d 686 (1981); *Drummond vs. Fulton County Department of Family and Children Services,* 237 S.E.2nd 839 (1976)

CONCLUSION

For the reasons given above, the petitioner and natural mother Jodie Denise Pope respectfully requests that this court grant its application for discretionary appeal.

THE MALONE FIRM

/s/ Thomas William Malone by RB

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